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In the Supreme Court of the United States

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether an employee of the United States government, charged in state court with a crime allegedly committed while performing official duties on behalf of the United States, is entitled to remove his trial to federal district court under 28 U.S.C. 1442(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 813 F.2d 960. The opinions of the district court (Pet. App. 21a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1987. A petition for rehearing was denied on October 21, 1987 (Pet. App. 23a-24a). On December 10, 1987, Justice O'Connor extended the time within which to file a petition for a writ of

certiorari to and including January 19, 1988. The petition was filed on that date and was granted on May 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT

Kathryn Mesa and Shabbir Ebrahim are employees of the United States Postal Service. In separate incidents each was involved in a collision while driving a United States Postal Service vehicle in the course of delivering the United States mail. Petitioner Mesa struck and killed a bicyclist. She was charged in California state court with vehicular homicide. Petitioner Ebrahim collided with a police car and was charged by the officer with speeding and failure to yield. Pet. App. 2a & n.2.

The United States Department of Justice is representing both petitioners. See 28 C.F.R. 50.15(a). Pursuant to 28 U.S.C. 1442(a)(1), petitioners filed

removal petitions in the United States District Court for the Northern District of California. The district court granted the petitions and denied motions by the State of California to remand the cases to state court. The State filed an interlocutory appeal in each case, challenging the denial of its remand motion. The two cases were consolidated by order of the court of appeals (Pet. App. 2a n.1). Petitioners challenged the appealability of the district court's decisions denying remand. The court of appeals held that, although the State could not bring an interlocutory appeal, the court nonetheless had jurisdiction to issue a writ of mandamus to order the cases remanded to state court (*id.* at 4a-7a).[1]

On the merits, a divided panel of the court of appeals held that the fact that petitioners were performing their duties as federal officers at the time and place of the alleged criminal conduct did not satisfy the "color of office" requirement of 28 U.S.C. 1442(a)(1). The court stated (Pet. App. 10a) that the primary purpose of the removal statute was to permit a federal official with a federal defense to litigate that defense in federal court. Petitioners have not raised any federal defense, the court noted (*id.* at 11a), and their cases therefore turn entirely on issues of state law. While acknowledging (*id.* at 13a) that a desire "to permit trial on state-law claims free from local prejudice against federal interests * * * certainly played a role in the evolution of section 1442(a)(1)," the court nonetheless concluded (Pet. App. 11a) that "[t]he attenuated federal interest in ensuring that [petitioners'] trial be

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[1] Petitioners did not seek certiorari on this aspect of the court of appeals' decision. See Pet. 3 n.1.

unbiased does not justify an invasion of the state's authority to police its streets."

The court of appeals acknowledged (Pet. App. 11a) that this Court had "read the 'color of office' provision of 28 U.S.C. § 1442(a)(1) quite broadly" in *Willingham* v. *Morgan*, 395 U.S. 402 (1969), and held there that removal was appropriate based simply on "the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times" (*id.* at 409). The court of appeals noted, however, that *Willingham* was a civil case and declined to "casually import[]" that reading of the statute "into the criminal arena" (Pet. App. 12a). Stressing "the states' compelling interest in the administration of their criminal justice systems," the court of appeals concluded (*id.* at 14a) that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense." The court therefore issued the writ of mandamus ordering the district court to remand the two prosecutions for trial in the California state courts.

Judge Noonan dissented, concluding that the "unusually spacious" language of the statute was not to be given such a restricted reading. "It is not a requirement for removal," he stated (Pet. App. 18a), "that the employee have a federal defense to the charges. * * * The federal employee charged with a crime for an act done in the course of his employment and entirely innocent of any unlawful act whatsoever has 'no federal defense.' His defense is, 'I did not do the unlawful act complained of.' The removal statute reflects no intention on the part of Congress to deny such an entirely innocent federal employee the benefit of a federal forum."

Judge Noonan noted (Pet. App. 17a) that "[i]t is no derogation of any existing state sovereignty when the national government exercises its own authority to create a federal forum in which the acts of its agents will be measured." He therefore rejected the majority's use of different standards for removal in criminal and civil cases. "In the removal statute," the dissent observed (*ibid.*), "Congress has made no differentiation between 'civil actions' and 'criminal prosecutions.' * * * A court should not distinguish where Congress in the exercise of its constitutional power has drawn no line." Judge Noonan therefore concluded (*id.* at 16a) that "under color of office" is properly read in both types of cases as "the equivalent of 'within the scope of their employment.'"

SUMMARY OF ARGUMENT

Section 1442(a)(1) permits removal of "[a] civil action or criminal prosecution" by "[a]ny officer of the United States" for "any act under color of such office." The phrase "under color of office" limits removal to suits arising out of the exercise of an employee's official duties. But there is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employee's actions be justified by federal law. The term "color," as used in Section 1442(a)(1), refers to the *appearance* of a right, authority or office, such as any federal employee enjoys when he is performing official duties, whether his actual performance of those duties is justified by federal law or not.

This reading of the phrase "under color of office" is consistent with the Court's construction of analogous language in other federal statutes. The Court has always read the words "under color of" law or

legal authority to apply whenever a public employee is acting in his official capacity, even if he abuses the authority given to him. An equally broad reading is appropriate here. An FBI agent conducting an allegedly illegal search, an engineer from the Army Corps of Engineers building an allegedly unsafe bridge, an EPA inspector conducting an allegedly negligent inspection, and a postman delivering the mail at an allegedly excessive speed are all acting "under color of" their respective offices, even if their actions are wrongful under state law and not justified by federal law.

This Court's civil cases construing Section 1442 (a)(1) and its predecessors have therefore permitted removal by federal officials without regard to the presence of any issue of federal law raised by the defendant. Removal is appropriate, the Court has stressed, whenever there is a causal connection between the charged conduct and the performance of the defendants' official duties, and that connection may consist of nothing more than the fact that the defendants were on duty, at their place of federal employment, when the incident occurred. The Court's civil cases make clear that the right to removal is as available to a federal defendant who simply denies committing the act alleged as to one who admits the act but claims an official immunity.

The Court's criminal cases construing the removal statute are more ambiguous, but on balance they are also consistent with the plain meaning of the statute. Furthermore, there is no justification in the language of the statute for applying a test in criminal cases different from that used in civil cases. Section 1442 (a)(1) states simply that "[a] civil action or criminal prosecution * * * may be removed" and then proceeds to state a single test governing all cases.

The court of appeals' requirement of a "federal defense" as a prerequisite to removal frustrates the statute's purpose—to protect federal officers from interference by hostile state courts. Federal policy can be disrupted more readily by false charges than by the relatively rare circumstance of otherwise legitimate charges that are expressly precluded by federal law. In either instance, the federal interest in ensuring a federal forum is the same. The decision below thus presents a potential threat to federal supremacy anywhere federal policies encounter local hostility.

ARGUMENT

A FEDERAL EMPLOYEE CHARGED IN STATE COURT WITH A CRIME ALLEGEDLY COMMITTED WHILE PERFORMING OFFICIAL DUTIES ON BEHALF OF THE UNITED STATES IS ENTITLED TO REMOVE HIS TRIAL TO FEDERAL DISTRICT COURT UNDER 28 U.S.C. 1442(a)(1)

The court of appeals has imposed upon the "unusually spacious" (Pet. App. 18a) language of Section 1442(a)(1) an artificial distinction between cases in which a federal official charged with a crime for actions within the scope of his employment proposes to offer a "federal defense" and those in which he does not. By allowing removal in the former instance but not the latter, the court of appeals seeks to strike a balance between the protection of federal governmental functions and the state's interest in the enforcement of its criminal laws (Pet. App. 13a-14a). The presence or absence of a "federal defense," however, is not a useful measure of this balance.

Whenever a federal official is charged with a state crime for actions within the scope of his employment, the prosecution poses a challenge to the manner in which the official has performed his duties. The challenge to that performance of his job is no less where the official responds that he did not do the act charged, or that he lacked a criminal state of mind, than where he claims that his behavior is shielded by an official privilege or immunity. In each instance, the official is called to account in a state criminal court for the manner in which he has acted in the course of carrying out his federal responsibilities. In each instance, federal government functions will be disrupted and the possibility exists that interference by the state is a deliberate attempt to frustrate federal policy.

Whether the criminal charges in any given case are justified or unjustified cannot be known until after a determination of the merits of the case. What the removal statute ensures is that that determination will be made in federal court so as "to protect federal officers from interference by hostile state courts" (*Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969)). At the same time, the removal statute ensures "the highest regard for a State's right to make and enforce its own criminal laws" (*Arizona* v. *Manypenny*, 451 U.S. 232, 243 (1981)) by requiring that all but the procedural aspects of the removed case will still be governed by state law. That is the balance struck by the removal statute.

The reading of Section 1442(a)(1) that we advocate here—which allows removal whenever a federal official is prosecuted for the manner in which he has performed his federal duties—is supported by the language and history of the statute. It is also explicitly adopted in this Court's cases dealing with the removal of civil actions against federal employees, and is consistent with a reasonable reading of this Court's decisions on the removal of state criminal prosecutions.

A. The Plain Language Of Section 1442(a)(1) Permits Removal Without Assertion Of A Federal Defense

Section 1442(a)(1) is written in "sweeping terms." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1057 (3d ed. 1988). It permits removal of "[a] civil action or criminal prosecution" by "[a]ny officer of the United States" for "any act under color of such office." The phrase "under color of office" limits removal to suits arising out of the exercise of an employee's official duties. Thus, a federal employee who commits a crime or a tort while off-duty is not entitled to invoke Section 1442(a)(1). See, *e.g.*, *Maryland* v. *Soper (No. 2)*, 270 U.S. 36, 42 (1926) (appearance of federal official before a state coroner "is not an act of his under federal authority" and he connot remove a subsequent prosecution for obstruction of justice). But employees who are brought to trial in state court for actions taken while "on duty, at their place of federal employment" (*Willingham* v. *Morgan*, 395 U.S. at 409) are entitled to remove their cases to federal court. There is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employees' actions be justified by federal law. Section 1442(a)(1) is not limited to employees "with a defense based on federal law," and the words "under color of office" will not bear such weight.

The term "color," as used in Section 1442(a)(1), implies the *appearance* of a right, authority or office, such as any federal employee enjoys when he is per-

forming official duties, whether his actual performance of those duties is justified by federal law or not.

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Screws v. *United States*, 325 U.S. 91, 111 (1945) (plurality opinion) (construing predecessor of 18 U.S.C. 242).

This construction is consistent with the Court's interpretation of analogous language in 42 U.S.C. 1983, which provides a federal cause of action against any person who deprives a citizen of his federal rights while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." The predecessor of 42 U.S.C. 1983, Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, was enacted, like the predecessors of Section 1442 (a)(1), to provide a federal forum for a category of cases that Congress was unwilling to trust to the state courts. See *Mitchum* v. *Foster*, 407 U.S. 225, 238-242 (1972).

The Court has consistently interpreted the "under color of state law" requirement in Section 1983 broadly. "[S]tate employment is generally sufficient to render the defendant a state actor." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 936 n.18 (1982). Indeed, "a public employee acts under color of state law while acting in his official capacity or while exercising

his responsibilities pursuant to state law" even "when he abuses the position given to him by the State." *West* v. *Atkins*, No. 87-5096 (June 20, 1988), slip op. 7. See also *Monroe* v. *Pape*, 365 U.S. 167, 184-187 (1961), overruled on other grounds, *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 695-701 (1978); *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (similar construction for "under color of" state law language in predecessor of 18 U.S.C. 242).[2]

Just as the meaning of the words "under color of state law" has not been limited to acts arguably authorized by law, the words "under color of office"

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[2] In *Screws* v. *United States*, *supra*, the dissent expressly drew the parallel between the language of the removal statute and the language of the predecessor of Section 242, stating that the construction of the former "should be binding in the situation now before us" (325 U.S. at 146). The dissent, however, read the Court's cases interpreting the removal statute narrowly to "indicate[] that misuse of federal authority does not come within the statute's protection" (*id.* at 145). As discussed below, that reading is not mandated by the criminal cases upon which the dissent relied. See pages 17-25, *infra*.

The plurality in *Screws* did not take issue with the dissent's "strict" reading of the removal statute, but instead simply asserted that the statute was not "in point" because the policies behind the two statutes were different (325 U.S. at 111-112). But the parallel language of the two contemporaneous statutes cannot be so easily brushed aside. If anything, the "under color of" state law language in 42 U.S.C. 1983 and 18 U.S.C. 242 would suggest a narrower limitation to conduct grounded in specific state laws as compared with the "under color of office" language of the removal statute, which suggests that the conduct at issue need only arise out of the performance of official duties. Furthermore, the policies underlying Section 1442(a)(1) fully support a reading of the statute at least as broad as that of Sections 242 and 1983. See pages 28-31, *infra*.

have not been and should not be limited to acts arguably authorized by that office. An FBI agent conducting an allegedly illegal search, an engineer from the Army Corps of Engineers building an allegedly unsafe bridge, an EPA inspector conducting an allegedly negligent inspection, and a postman delivering the mail at an allegedly excessive speed are all acting "under color of" their respective offices. Even if their actions are wrongful under state law and not justified by federal law, these employees are still "undertak[ing] to perform their official duties," not acting "in the ambit of their personal pursuits." *Screws* v. *United States*, 325 U.S. at 111. In all such cases, the federal employees are entitled "to present their version of the facts to a federal, not a state, court." *Willingham* v. *Morgan*, 395 U.S. at 409.[3]

[3] A similar reading was intended for the "under color of" language in the judicial review provision of the Administrative Procedure Act, 5 U.S.C. 702, which provides, in pertinent part:

> An action in a court of the United States seeking relief other tha[n] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

The legislative history of this provision indicates that the quoted language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seekirg relief other than money damages and based on the assertion of *unlawful* official action by a Federal officer." S. Rep. 94-996, 94th Cong., 2d Sess. 2 (1976) (emphasis added). It is clear then that action can be "under color of legal authority" whether or not it is justified by, and even where it violates, that authority. See *Webster* v. *Doe*, No. 86-1294 (June 15, 1988).

B. The Statute's History And Its Construction By This Court Are Consistent With The Plain Meaning Interpretation Of Its Language

1. *The History of Section 1442(a)(1)*

Section 1442(a)(1) has a long lineage. The first removal act for federal officials was a temporary measure enacted in 1815.[4] See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. Prompted by New England's resistance to embargoes imposed during the War of 1812 (see 28 Annals of Cong. 758-761 (1814)), the Act permitted those enforcing the U.S. Customs laws to remove "any suit or prosecution" against them into federal court for "any thing done or omitted to be done, as an officer of customs," or "by virtue of" the customs laws or "under colour thereof."

In 1833, Congress found it "desirable to revive [the removal provision], with some modifications better adapted to the occasion" (9 Cong. Deb. App., Pt. 2, at 153 (1833)), in response to a new national crisis—South Carolina's nullification of the federal customs laws. The "Force Bill," as it came to be known, provided removal authority for any "suit or prosecution" brought against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States or under colour thereof." Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. The avowed purpose of the removal provision was to prevent state interference with the collection of federal customs duties. 9 Cong. Deb. App., Pt. 2, at 153 (1833). Removal was considered necessary because federal officers could not get a fair trial from jurors who had sworn allegiance

[4] This removal provision was designed to last only during the War of 1812, though it was temporarily extended by the Act of Mar. 3, 1817, ch. 109, § 2, 3 Stat. 396.

to the South Carolina nullification act. *Id.*, Pt. 1, at 462 (remarks of Sen. Webster).

During the Civil War, Congress passed an additional, temporary provision to allow general removal by "any officer, civil or military" of "any suit or prosecution, civil or criminal" for any "wrongs done or committed * * * during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress." Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756. See *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1867). This removal provision expired shortly after the Civil War, but the Force Bill of 1833 continued in effect and was gradually expanded in scope to apply to collectors of the internal revenue (Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 17), to persons acting under color of the Elective Franchise Act (Act of Feb. 28, 1871, ch. 99, § 13, 16 Stat. 437-438 (repealed 1894)), to officers of either House of Congress (Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 401), to court officers (Act of Aug. 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of Aug. 29, 1916, ch. 418, § 3, Art. 117, 39 Stat. 669), to prohibition officers (National Prohibition Act of 1919, ch. 83, § 28, 41 Stat. 316 (repealed 1935)), and finally to "[a]ny officer of the United States or any agency thereof, or person acting under him" (Act of June 25, 1948, ch. 648, § 1442, 62 Stat. 938). The words "under color of office" were introduced in 1866, when the removal provision in the Force Bill was amended without debate, in a bill to restructure and lower taxes, to apply to "any case, civil or criminal" brought against a revenue officer "on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171 (codified as Rev. Stat. § 643 (2d ed. 1873-1874 ed.)).

2. *This Court's Civil Cases Construing Section 1442 (a)(1) And Its Predecessors Permit Removal Without Assertion Of A Federal Defense*

The "under color of office" language was first interpreted by the Court in a civil context in *Cleveland, C. &c., R.R.* v. *McClung*, 119 U.S. 454 (1886).[5] In *McClung*, a railroad brought suit in state court against a collector of customs alleging that the collector's deputy delivered goods upon which there was a lien for freight charges to a consignee upon receipt of the money due for the freight charges without turning that money over to the railroad. The railroad sued the collector for the money so received, and the collector removed the case to federal court. The railroad contended in this Court that the case was improperly removed because the collector had claimed in his defense "that it was not the official duty of the collector to collect the carrier's money, and, therefore, that he is not liable for the acts of his deputy in that behalf" (119 U.S. at 461). The collector had claimed, in other words, not that his actions were justified by federal law but rather that he bore no responsibility for the alleged wrongdoing.

The Court found the action removable despite the absence of any federal defense. "[T]he right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him it was done under color of his office. The thing to be tried is whether it was done" (119 U.S. at 461). *McClung*, therefore, stands for the proposition that a federal defense is not a prerequisite to removal. *McClung* makes clear, to the

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[5] *Tennessee* v. *Davis*, 100 U.S. 257 (1880), discussed *infra*, pages 19-21, is the earliest criminal case dealing with this statute.

contrary, that actions committed in the course of performing one's job are committed "under color of office" regardless what defense is to be offered.

This natural reading of the phrase "under color of office" was continued by this Court after Congress in 1948—without any comment or debate (see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *supra*, at 1057) —extended the scope of the removal statute to cover all federal employees. In *Willingham* v. *Morgan*, 395 U.S. at 409, the Court stated that removal is appropriate whenever there is a "causal connection" between the charged conduct and the performance of the defendant's official duties. In a suit by a prisoner against the warden and chief medical officer of a federal penitentiary, the Court found sufficient "causal connection" in the fact that the defendants' only contact with the prisoner had been in performance of their official duties. "The connection consists, simply enough, of the undisputed fact that [the defendants] were on duty, at their place of federal employment, at all the relevant times." *Willingham*, 395 U.S. at 409.

In *Willingham*, the Court noted that the defendants had a potential defense based on official immunity (see 395 U.S. at 406, 409), and that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court" (*id.* at 407). But the Court did not limit its reading of Section 1442(a)(1) to cases in which "federal officers can raise a colorable defense arising out of their duty to enforce federal law" (395 U.S. at 406-407). The Court in *Willingham* did not find it necessary even to discuss whether the claim of official immunity at issue there was colorable, concluding simply that "it was sufficient for [the defendants] to have shown that their relationship to [the

plaintiff] derived solely from their official duties" (395 U.S. at 409). Under those circumstances, the Court stated (*ibid.*), the defendants "should have an opportunity to present their version of the facts to a federal, not a state, court."

If the test applied in *Willingham* and *McClung* is applied in this case, petitioners are clearly entitled to removal. Petitioners have both pled "not guilty" to the charges against them. It is not presently clear what specific defenses they will offer. It is clear, however, that the events in question here occurred while petitioners were driving their mail trucks in the course of delivering the United States mail. As in *Willingham*, 395 U.S. at 409, petitioners were "on duty, at their place of federal employment, at all the relevant times," and, following that case's reasoning, they too "should have the opportunity to present their version of the facts to a federal, not a state, court" (*ibid.*).

3. *There Is No Justification For Applying, And This Court's Cases Do Not Mandate, A Different Test For Removal In Criminal Cases*

There is no persuasive basis, we submit, for applying a different test here on the ground that this is a criminal case. In *Willingham*, the Court did remark in passing (395 U.S. at 409 n.4) that "a more detailed showing might be necessary" in a criminal case "because of the more compelling state interest in conducting criminal trials in the state courts." As Judge Noonan noted, however, there is no justification in the language of the statute for such a distinction. Section 1442(a)(1) states simply that "[a] civil action or criminal prosecution * * * may be

removed" and then proceeds to state a single test governing all cases. The phrase "under color of office" cannot plausibly be read to mean different things for different cases, and "[a] court should not distinguish where Congress in the exercise of its constitutional power has drawn no line" (Pet. App. 17a).

The earliest removal statutes applied to "any suit or prosecution." See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198; Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. Although this language on its face appears to apply to both civil suits and criminal prosecutions, there was apparently some ambiguity as to whether the statute in fact extended to criminal cases. See Cong. Globe, 37th Cong., 3d Sess. 534 (1863) (remarks of Sens. Sumner and Collamer). Congress accordingly amended the language of a bill providing broad removal authority during the Civil War so "as to exclude all possibility of doubt that this language is applicable to criminal as well as to civil suits or prosecutions." *Id.* at 535 (remarks of Sen. Sumner). The proposed amendment sparked considerable controversy. Some Senators contended that the bill was unconstitutional because it would allow federal courts to decide criminal cases involving only issues of state law. *Id.* at 534 (remarks of Sen. Trumbull); *id.* at 537 (remarks of Sen. Bayard). The amendment nonetheless passed by a comfortable margin (*id.* at 538) and was defended as "a matter of necessity" to ensure fair trials for federal officials charged with state offenses. *Id.* at 535 (remarks of Sen. Clark); *ibid.* (remarks of Sen. Sumner) ("I think that we ought to adapt it both to criminal and to civil proceedings, and that unless we do, the bill will be a failure.").

The statute as amended was, thus, made expressly applicable to "any suit or prosecution, civil or criminal." Act. of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756. This same language was then added to the Force Bill when it was amended in 1866. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. In *Tennessee* v. *Davis*, 100 U.S. 257, 265 (1880), the Court upheld the constitutionality of this predecessor to Section 1442(a)(1) and stated that the reasons for removal "are equally applicable to both" civil suits and criminal prosecutions. The Court also found "no room for reasonable doubt" that the removal statute applied to a murder prosecution brought against a revenue collector who claimed that he killed in self-defense while engaged in the discharge of his duties (100 U.S. at 261). "Such is [the statute's] positive language," the Court explained, "and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State" (*id.* at 262).

The Court in *Tennessee* v. *Davis* noted that the purpose of the removal statute is to prevent interference by state courts with the performance of federal functions (100 U.S. at 263). The Court recognized that the statute, in accordance with that purpose, authorizes removal whenever the acts of the defendant "were done, or claimed to have been done, in the discharge of his duty as a Federal officer" (*id.* at 261-262). Indeed, the Court expressly equated actions done by the defendant "under color of his office as a revenue collector"—the statutory test—with actions taken "while he was engaged in performing his duties as a revenue officer" (*id.* at 261). Although the decision also contains language suggesting that

removal may depend upon the assertion by the defendant of a "Federal right or authority" (*id.* at 262),[6] it cannot fairly be read to require, as a prerequisite to removal, a defense based on federal law. For, although the defendant in that case claimed that his actions were "done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty" (*id.* at 261), his claim of self-defense in fact turned on state rather than federal law.[7] The defendant's assertion

[6] See, *e.g.*, 100 U.S. at 262 ("when [the statute] speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority").

[7] In *Maryland* v. *Soper (No. 2)*, 270 U.S. 36, 42 (1926), the Court remarked that "acts committed by a federal officer in defense of his life, threatened while enforcing or attempting to enforce the law * * * are really part of the exercise of his official authority" because "[t]hey are necessary to make the enforcement effective." It does not follow, however, that such a defense is governed by federal law. A justified use of force in self-defense by a federal official enforcing federal law is indeed "necessary to make the enforcement effective," but the determination of whether the use of force was justified is still—except to the extent the Court is prepared to develop a federal common law of "justification" applicable to crimes committed by federal employees in the performance of their duties—a question of state rather than federal law.

Thus, in *Georgia* v. *Grady*, 10 Fed. Cas. 245 (1876), a soldier enforcing the revenue laws shot and killed the owner of an illegal still in what he claimed was self-defense. The soldier, charged with murder by the State of Georgia, removed the case to federal court under the same 1866 removal statute at issue in *Tennessee* v. *Davis*. The court in *Grady* permitted the removal, but nonetheless charged the jury that the soldier's defense was "to be determined by the law of Georgia" (10 Fed. Cas. at 247). The court went on to explain the extent to which "[t]he Code of Georgia justifies a homicide committed in defense of one's person" and stressed that "[t]he defendant had the same, and only the same, rights of self-defense that a citizen would have had under the same circumstances" (*ibid.*). The defendant was not to be afforded any special protection because he was a soldier, or because he was on duty performing his federal duties at the time of the shooting, or because the victim was engaged in a violation of federal law (*ibid.*).

of "federal authority" was only of the general authority to do his job undisrupted, and not of any federal law theory of defense. Thus, *Tennessee* v. *Davis* permits removal where no specific defense based on federal law is claimed.[8]

This reading of the removal statute was confirmed two years later by the Court's decision in *Davis* v. *South Carolina*, 107 U.S. 597 (1882). In that case a soldier enforcing the revenue laws shot and killed a distiller when the victim "made his escape through a hole in the side of the house near where [the soldier] was standing, sprang past him, frightening his horse, and accidentally discharging his piece" (107 U.S. at 598). When the soldier was indicted for murder in state court, he removed the case to federal court stating only that "[y]our petitioner shows that at the time of said accident he was in the discharge of his duty, and that said shooting * * * was purely accidental" (*ibid.*). This Court affirmed the removal,

[8] Although the Court notes that the removal petition went beyond these minimal requirements by asserting that the actions were "done under and by right of his office" (100 U.S. at 261), that remark, and others like it, seem to be addressed more to establishing the constitutionality of the removal there in issue than to stating an express requirement of the statute (see, *e.g.*, *id.* at 263).

noting simply that the removal "petition set out the necessary facts showing that the homicide which was charged against him as a crime took place while he was in discharge of his official duty" (*id.* at 600-601).

The Court's remaining decisions on the removal of state criminal actions against federal officials, while not without ambiguity, also support a construction of the statute that allows removal without the assertion of any justification based on federal law. In *Maryland* v. *Soper (No. 1)*, 270 U.S. 9 (1926), four revenue agents were charged with murder. They sought to remove the case to federal court on the grounds that the acts in question "were done in the discharge of their official duties as prohibition agents, and as officers of the internal revenue service in the discharge of their duty" (*id.* at 22). This Court rejected the removal petition at issue in that case, saying that it did not "negative the possibility that [the defendants] were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty" (*id.* at 35).

At some points in its opinion, the Court seemed to state that the removal petition would only be sufficient if it asserted a federal defense to the charges. See, *e.g.*, 270 U.S. at 34 ("The defense [the federal official] is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based."). The Court also stressed, however, that a defendant need not admit that he actually committed the charged offense in order to obtain removal.

Removal is available even to the officer who denies any relationship to the charged offense, provided only that there is "a causal connection between what the officer has done under asserted official authority and the state prosecution. * * * It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution." *Id.* at 33.

The removal petition in *Soper (No. 1)* was denied because it was "not sufficiently informing and specific to make a case for removal" (270 U.S. at 34). It failed to state in a "candid, specific and positive" manner precisely what it was that the defendants were claiming happened (*id.* at 35), and thus failed to show that "the reason and occasion for the criminal charge and the prosecution against them" arose out of their official duties and not out of "other acts than official acts at the time and on this occasion" (*ibid.*). The petition was not denied because it failed to state a federal defense to the charges.[9]

Colorado v. *Symes*, 286 U.S. 510 (1932), appears to have been decided on similar grounds. In that case

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[9] A comparison with *Maryland* v. *Soper (No. 2)*, *supra*, is instructive. In *Soper (No. 2)*, the Court held that federal officials could not remove a prosecution for conspiracy to obstruct justice arising out of their testimony before a state coroner. The defendant officials in *Soper (No. 2)* had no federal defense to the state charges, but the Court did not deny removal on that ground. Rather, the Court denied removal because the charges against the officials did not arise out of "an act of [theirs] under federal authority" (270 U.S. at 42). Similarly, the Court in *Soper (No. 1)* rejected the removal petition as insufficient—though with leave to amend it—not because it did not assert a federal defense but because the defendant officials did not "negative the possibility that they were doing other acts than official acts" (270 U.S. at 35).

a prohibition agent charged with murder in state court sought to remove the case to federal court on the ground that the victim was killed in a struggle while resisting arrest for a violation of the prohibition laws. This Court rejected the removal petition because it did not "give specific information as to the details of the occurrence" (286 U.S. at 521) so as to enable the Court to determine "that petitioner's claim [that he was entitled to removal] is not without foundation and is made in good faith" (*id.* at 519). The Court indicated that a proper removal petition must show that the defendant acted only "in the proper discharge of his duty" (*id.* at 518). But that fact could be established by a claim that the homicide was "excusable or justifiable" (*ibid.*) under the state law of self-defense, or presumably by the claim that "the act charged was not in fact done" (*McClung*, 119 U.S. at 461). The Court did not say that any peculiarly federal defense was necessary.

Most recently, in *Arizona* v. *Manypenny*, *supra*, the Court assumed the propriety of removing to federal court a state assault prosecution against a Border Patrol agent on the ground that "the charge arose from an act committed while on duty for the INS" (451 U.S. at 235). While the removal itself was not challenged before this Court, it is noteworthy that the Court's discussion in explaining the removal articulated a standard—"an act committed while on duty"—indistinguishable from that set forth in *Willingham*, and at no point suggested that a more stringent standard might be justified because a criminal case was involved.

The Court in *Manypenny* did note that the removal statute "was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties" (451 U.S. at 241). But the Court did not state that an immunity defense based on federal law was a prerequisite to removal.[10] Rather, the Court noted a broader purpose behind the removal statute, which also "permits a trial upon the merits of the state-law question free from local interests or prejudice" (*id.* at 242). "For [both] these reasons," the Court stressed, "the right of removal is absolute for conduct performed under color of federal office, and * * * the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Ibid.* (quoting *Willingham* v. *Morgan*, 395 U.S. at 407).

C. Related Removal Provisions Reinforce The Conclusion That Removal Under Section 1442(a)(1) Does Not Require A Federal Defense

1. Subsection (a)(3) of 28 U.S.C. 1442 provides for the removal of any civil action or criminal prosecution brought against court officers. This subsection derives from the Act of Aug. 23, 1916, ch. 399, 39 Stat. 532. In light of the 1948 extension of 28 U.S.C. 1442(a)(1) to "[a]ny officer of the United States," this specialized removal provision—like sub-

[10] Indeed, "an immunity defense had not been raised at trial" (451 U.S. at 236) and, thus, was not used by the defendant to justify the removal of his case under Section 1442(a)(1). Rather, as noted, removal was appropriate simply because "the charge arose from an act committed while on duty for the INS" (451 U.S. at 235). But the district court sua sponte concluded after trial "that it had erred in failing to instruct the jury on such a defense" and granted a "presumed motion for acquittal" by the defendant on that ground (*id.* at 236-237). The question at issue in that case was whether state or federal law governed the right of the state to appeal from that decision.

section (a)(4), which applies to officers of either House of Congress—is merely historical "residue" of earlier removal statutes. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *supra*, at 1057. A consideration of its precise language, however, reinforces the conclusion that removal applies to any case in which the federal official is acting "in the performance of his duties" and is not limited to cases in which the federal employee raises a federal defense.

Subsection (a)(3) permits removal of any case brought against "[a]ny officer of the courts of the United States, for any act under color of office *or in the performance of his duties*" (28 U.S.C. 1442(a)(3) (emphasis added)). In *Gay* v. *Ruff*, 292 U.S. 25 (1934), this Court noted that the predecessor of this subsection was designed to give United States marshals executing process " 'the same protection in all cases now given to officers acting under the revenue laws * * *.' " 292 U.S. at 38 (quoting H.R. Rep. 776, 64th Cong., 1st Sess. 2 (1916)). In other words, both Congress and this Court viewed the additional phrase "in the performance of his duties" as simply coterminous with the phrase "under color of office," since only the latter and not the former was to be found in the removal statute covering officers acting under the revenue laws. This additional clause did not broaden the scope of the provision at all because such actions were already covered.[11]

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[11] The Court held in *Gay* v. *Ruff* that the new provision did not authorize removal of an action against a railroad receiver appointed by a federal court to recover damages caused by the negligence of railroad employees after the appointment. But the reason for that holding was simply that the receiver was "not an officer engaged in enforcing an order of a court" (292 U.S. at 39).

2. Section 1443(2) of Title 28 permits removal of "civil actions or criminal prosecutions" brought in state court "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." In *Greenwood* v. *Peacock*, 384 U.S. 808, 823 (1966), this Court held that removal under this provision was not available to private persons because the "color of authority" language "was clearly limited to enforcement activity by federal officers and those acting under them."[12] But the Court did not suggest that any federal defense was required as a prerequisite to removal by those officers. Rather, the Court stressed (*id.* at 823 n.21) that removal applied to "the full range of enforcement activities in which federal officers might be engaged under the Civil Rights Act." That reading of the phrase "under color of" seems particularly appropriate in the area of civil rights enforcement, an area in which federal policies have frequently encountered local hostility. To require a federal defense would, as we explain below, defeat the purpose of the removal statute by permitting a state to interfere with federal enforcement activities by means of charges that, while not expressly precluded by federal law, are simply false.

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[12] The Court acknowledged (384 U.S. at 820 n.17) that, in light of the 1948 extension of Section 1442(a)(1), "many, if not all, of the cases presently removable under § 1443(2) would now also be removable under § 1442(a)(1)." The Court noted (*ibid.*), however, that "[t]he present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation."

D. The Purpose Of Section 1442(a)(1) Would Be Frustrated If A Federal Defense Were a Prerequisite To Removal

Removal provisions, in one form or another, have been in force for most of the history of the Republic. "The purpose of all these enactments is not hard to discern" (*Willingham*, 395 U.S. at 406), and it extends far beyond the "narrow, grudging interpretation of § 1442(a)(1)" (*id.* at 407) offered by the court of appeals. To be sure, "*one* of [the] purposes [of removal] was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties" (*id.* at 405 (emphasis added)); but the removal statute also performs a broader function, which is "to protect federal officers from interference by hostile state courts" (*ibid.*) by ensuring that those charged with a crime under state law receive a "trial upon the merits of the state-law question free from local interests or prejudice" (*Arizona* v. *Manypenny*, 451 U.S. at 242). See also *Colorado* v. *Symes*, 286 U.S. at 517; *Soper (No. 1)*, 270 U.S. at 32; *Tennessee* v. *Davis*, 100 U.S. at 263.

"The original removal statutes were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of the federal government by the state." *Pennsylvania* v. *Newcomer*, 618 F.2d 246, 250 (3d Cir. 1980). The Ninth Circuit's decision, which makes a "federal defense" a prerequisite to removal, thus defeats the primary purpose of the removal statute. The court of appeals simply dismissed the "federal interest in ensuring that [petitioners'] trial be unbiased" as too "attenuated" to "justify an invasion of the state's authority to police its streets" (Pet. App. 11a). But "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum" and it is not for the court of appeals to frustrate that policy with "a narrow, grudging interpretation of § 1442(a)(1)" (*Willingham* v. *Morgan*, 395 U.S. at 407).[13]

The courts of appeal, at several points in its opinion, acted as if its decision were limited to postal worker traffic cases. For example, the court stated (Pet. App. 13a) that "[t]here is simply no reason to believe that, on a systematic basis, postal workers will not get a fair shake in state court." See also *id.* at 14a ("Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees."); *ibid.* (noting that "the overcrowded district courts" should not be troubled with such "pesky cases"). The court intimated (*id.* at 13a) that if there were an allegation that the state was bringing a prosecution "to frustrate or impede the performance of federal duties," then "a different, and more difficult, case" for removal would be presented. But the court fails utterly to explain how such a possibility is left open by its ruling.

On the contrary, unless removal is to depend upon a district judge's ab initio, ad hoc evaluation of the merits of the case, a federal official whose defense to a state criminal charge is a denial of the act alleged would be precluded from removal even in the face of

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[13] Furthermore, all but the procedural aspects of the removed case will still be governed by state law. *Arizona* v. *Manypenny*, 451 U.S. at 241. "Thus, while giving full effect to the purpose of removal, this Court retains the highest regard for a State's right to make and enforce its own criminal laws" (*id.* at 242-243).

clear evidence that the state is deliberately attempting to thwart federal policy by bringing the case. "The removal statute reflects no intention on the part of Congress to deny such an entirely innocent federal employee the benefit of a federal forum" (Pet. App. 18a (Noonan, J., dissenting)). Indeed, federal policy can be disrupted more readily by false charges than by the relatively rare circumstance of otherwise legitimate charges that are expressly precluded by federal law. In either instance, the federal interest in ensuring a federal forum is the same. The decision below thus presents a potential threat to federal supremacy anywhere federal policies encounter local hostility. The fact that such concerns are not implicated in the instant case is irrelevant to the proper construction of the removal statute.[14] If the statutory entitlement of federal employees to removal without assertion of a federal defense is lost in this context, it is also lost "in the context of civil rights law or some realm of federal authority likely to encounter antagonism in state court" (*id.* at 13a).

Each petitioner is charged with a crime for an alleged violation of state law committed while driving a mail truck in the course of delivering the United States mail. As the Court stated in *McClung*, 119 U.S. at 461, "[s]uch a suit is removable, and certainly the right to a removal is not taken away

[14] The diversity jurisdiction of federal district courts (U.S. Const. Art. 3, § 2; 28 U.S.C. 1332) was established, like the removal authority of federal employees, because "foreign" individuals might be viewed with a hostile eye by local courts. *Dodge* v. *Woolsey*, 59 U.S. (18 How.) 331, 354 (1855); *The Federalist* No. 80 (A. Hamilton). No showing of potential bias is required, however, to justify that jurisdiction in individual cases.

because the [federal official] says in his defence that the act charged was not in fact done. If done by him it was done under color of his office. The thing to be tried is whether it was done." Petitioners, like any other federal employees "undertak[ing] to perform their official duties" and not simply acting "in the ambit of their personal pursuits" (*Screws* v. *United States*, 325 U.S. at 111), "should have an opportunity to present their version of the facts to a federal, not a state, court" (*Willingham*, 395 U.S. at 409). There is no "pesky" case exception to the removal statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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